STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

Supreme Court No. 157210
Court of Appeals No. 322820
Livingston Circuit Court No. 12-020831-FH

DENNIS KEITH TOWNE,

Defendant-Appellant.
_____/

BRIEF OF AMICUS CURIAE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

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INTEREST OF AMICUS CURIAE

Criminal Defense Attorneys of Michigan (CDAM) is a statewide, nonprofit organization of public defenders, contract defenders and private attorneys. Since its founding in 1976, CDAM has provided continuing legal education for criminal defense lawyers. It has served as amicus curiae in many cases of significance to the criminal jurisprudence of this state, and it appreciates this Court's invitation to continue that tradition in this case.

STATEMENT OF SUPPLEMENTAL QUESTIONS ADDRESSED BY AMICUS

I. (Supplemental Question 1): Did the officers exceed the proper scope of a knock and talk when they approached and secured the defendant's home at night while attempting to execute an arrest warrant for the defendant's son?

The Court of Appeals did not answer.

Amicus Curiae answers, "Yes."

II. (Supplemental Questions 2 & 3): Did police have sufficient grounds to believe that the subject of the arrest warrant was inside the defendant's home, and what is the appropriate standard to determine whether the police are permitted to enter a third-party's home or curtilage to execute an arrest warrant?

The Court of Appeals did not answer.

Amicus Curiae answers, "The police lacked sufficient grounds to believe defendant's son was in the home, but it does not matter even if they did have sufficient grounds to believe he was there because a search warrant is still required to enter a third-party's home unless there is an exigency or consent to enter."

III. (Supplemental Question 5): Should the exclusionary rule should apply under these circumstances?

The Michigan Court of Appeals answered, "No."

Amicus Curiae answers, "Yes."

ARGUMENT[1]

I. **(Supplemental Question 1): The officers exceeded the proper scope of a knock and talk when they approached and secured the defendant's home at night while attempting to execute an arrest warrant for the defendant's son.**

In both its original 2016 opinion and its 2017 opinion on remand, the Court of Appeals failed to consider the obvious question of whether, in light of *Florida v. Jardines*, 569 US 1; 133 S Ct 1409; 185 L Ed 2d 495 (2013), *whether the entire police operation in this case began as an unconstitutional "knock and talk."* Remarkably, the Court of Appeals failed to consider that threshold question even after this Court remanded for reconsideration in light of *People v Frederick*, 500 Mich 228; 895 NW2d 541 (2017), where this Court held that a similar middle-of-the-night "knock and talk" was an unconstitutional search under *Jardines*.

In fact, the officers exceeded the scope of a constitutional "knock and talk" in two distinct ways: (1) they invaded Mr. Towne's curtilage and knocked on his front door at 10:15 p.m., more than five hours after the sun had set on December 15, 2011, and hours after ordinary citizens would believe they had an "implied license" to knock on that door without an invitation; and (2) as the police knocked at the front door, they simultaneously sent an officer into Mr. Towne's backyard, where Mrs. Towne saw him shine a flashlight into the family room of the home from the back deck.

On this record, the answer to the Court's first question should be indisputable. The police entered into the defendants' curtilage, a constitutionally protected area, and engaged in conduct

[1] Amicus accepts the Statement of Facts set forth in the Defendant-Appellants supplemental brief.

with the objectively apparent intent to obtain evidence for use in criminal prosecutions. As Justice Scalia put it for the Court in *Jardines*, "The officers were gathering information in an area belonging to Jardines and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner." 569 US at 5-6.

This Court applied *Jardines* in *Frederick* and concluded that the knock-and-talks the police performed there were unconstitutional warrantless searches of the curtilage because the homeowners had not implicitly licensed the police, or anyone else, to drop by for uninvited middle-of-the-night visits. 500 Mich at 237-39. That is, the implied license for the public to approach and knock on a front door is "time-sensitive." *Id.* at 238.

In *Jardines*, the police violated the implied license not by arriving too late but by engaging in behavior while on the premises (namely, conducting a dog sniff of the front door) that would not be expected from Girl Scouts, hawkers, and others who might approach and knock at a stranger's front door. 569 US at 8-10. Thus, even if the police do enjoy an implied license to approach a front door, they engage in an unconstitutional warrantless search if they exceed that license by engaging in behavior beyond what an ordinary citizen might do. As Justice Scalia explained, if one were to look outside and see someone engaging in conduct such as having a dog sniff the front porch without permission, that "would inspire most of us to—well, call the police." *Id.* at 9.

Here, the police operation managed to plainly violate both *Frederick* and *Jardines.* As for the time of day, it would be unthinkable for Girl Scouts, insurance salesman, political campaigners, religious proselytizers, or anyone else not expressly invited to march up to a stranger's door at

10:15 p.m. on a cold December night and knock on the door. This Court explained the test in *Frederick*: "as any Girl Scout knows, the 'background social norms that invite a visitor to the front door,' typically do not extend to a visit in the middle of the night." 500 Mich at 239 (quoting *Jardines*, 569 US at 8). This Court quoted *United States v Lundin*, 817 F3d 1151, 1159 (CA9 2016), for the proposition that "[U]nexpected visitors are customarily expected to knock on the front door of a home only during normal waking hours."

As any Girl Scout or petition circulator well understands, 10:15 p.m. is not "normal waking hours" because knocking on the door at that hour risks disturbing the sleep of children, the elderly, and many other adults who must rise early to get to work on time. In fact, virtually all Americans, whether they are night owls or not, would be alarmed by strangers pounding on the front door at such an hour. Many of us would call the police, while others would "greet" such uninvited visitors with extremely angry words. Indeed, in many cases the resident would answer the door with a firearm handy.

In short, the police exceeded the scope of a constitutional knock-and-talk by arriving late at night without an invitation for indisputably investigative purposes. The time of day alone renders the police action unconstitutional, just as it did in *Frederick*.

But even aside from the late hour, the police exceeded the scope of a knock-and-talk a second way. The police did not merely approach the front door and knock; *they simultaneously sent one or more officers into the backyard, where one of them shined his flashlight into the home from the deck.*

No conceivable version of the implied license includes that conduct. If an ordinary homeowner would call the police upon seeing a stranger guiding a dog around the front porch to sniff the area, *Jardines*, 569 US at 9, that same homeowner would have an even stronger reaction

to seeing a flashlight-wielding stranger peering into the house from the backyard. There is, to be clear, no possible way to justify that invasion under an implied license.

Therefore, the answer to the Court's first question is an emphatic "Yes, the police exceeded the scope of a constitutional knock-and-talk." And because they did not have a search warrant and no exception to the warrant requirement applied, that conduct violated the Fourth Amendment. *Frederick*, 500 Mich at 242.

II. (Supplemental Questions 2 & 3): The police did not have sufficient grounds to believe that the subject of the arrest warrant was inside the defendant's home, but it does not matter even if they did because they still needed a search warrant to enter a third-party's home.

As discussed above, the police unconstitutionally invaded the curtilage of Mr. Towne's home when they went to the front door at 10:15 p.m. and simultaneously sent one or more other officers into the backyard. It is not disputed that the police were looking for Mr. Towne's son, for whom they had an arrest warrant.

For the reasons explained by Mr. Towne in his supplemental brief at 26-30, the police did not have any sufficient grounds to believe that Richard Towne was inside Mr. Towne's home that evening. They had, at best, stale information that Richard had lived there some five years earlier and that he had left vehicles there, which were now rusting away in the weeds. And they had no particular reason at all to think Richard Towne was visiting his parents that night.

But even if they did have some reason to think Richard was there that night, that belief would not justify exceeding the scope of a knock-and-talk by arriving late at night and sending an officer into the back yard. Probable cause that Richard was there would be grounds to obtain a search warrant (which the police eventually sought), not invade the curtilage without a warrant.

This conclusion is dictated by *Steagald v United States*, 451 US 204; 101 S Ct 1642; 68 L

Ed 2d 38 (1981). In *Steagald*, exactly as in this case, the police had an arrest warrant for a person, Lyons, and some information leading them to believe that Lyons could be found in the home of Steagald, a third person. *Id.*, 451 US at 206. Exactly as in this case, the police in *Steagald* entered the constitutionally-protected area of the third person without a search warrant and, exactly as in this case, that entry led to the discovery of evidence used to prosecute the third person. *Id.* at 207. The issue before the Court was whether the arrest warrant for Lyons alone, in the absence of consent or an exigency, provided sufficient justification to enter Steagald's home to look for Lyons. *Id.* at 212.

The Court concluded that the arrest warrant justified entering Lyons' home, *see Payton v New York*, 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980), but the police needed a *search warrant (absent consent or exigency) to justify an entry into a third person's home*. 451 US at 215-16, 222. Thus, the Court concluded that the entry into Steagald's home was unconstitutional and reversed the lower court decision denying Steagald's motion to suppress. *Id.* at 222.

Applying *Steagald* to this case is straightforward. It does not matter if the police had sufficient grounds to believe Richard was temporarily inside Mr. Towne's home. Absent an exigency or consent, the police needed a search warrant to invade Mr. Towne's curtilage or home in order to execute the arrest warrant for Richard.[2] And it is undisputed that they did not have a

[2] With respect, amicus must point out that this Court's MOAA order cited two Sixth Circuit cases, *United States v Pruitt*, 458 F3d 477 (CA 6, 2006); and *United States v Hardin*, 539 F3d 404 (CA 6, 2008), both of which are completely beside the point. In both *Pruitt* and *Hardin*, the person named in the arrest warrant was the same person who later sought to suppress the evidence found when the police entered a third party's protected area to arrest him. *See Pruitt*, 458 F3d at 478-79 (recounting that police had arrest warrant for Pruitt and found him and incriminating evidence inside a third person's home); *Hardin*, 539 F3d at 407 (recounting that police had arrest warrant for Hardin and found him and incriminating evidence in a third person's apartment). In a *Steagald* situation, as in Mr. Towne's case, by contrast, *the person seeking to suppress the evidence is the third party property owner, not the person the police sought to arrest*. And as *Steagald* makes completely clear, the police need not only sufficient grounds to believe the person to be arrested

search warrant when they invaded Mr. Towne's curtilage.

Therefore, *Steagald* compels the conclusion that even if the police had good reasons to believe Richard was on the premises (which they didn't), they still would have needed a search warrant to justify invading Mr. Towne's curtilage. Since they did not have one, that invasion violated Mr. Towne's Fourth Amendment rights.

III. (Supplemental Question 5): The exclusionary rule should apply because the unconstitutional police conduct directly led to the discovery of the evidence.[3]

The Court of Appeals on remand noted that "We previously held that Sura's and Keller's action did not lead to the recovery of any evidence, and, thus, the exclusionary rule was inapplicable." Court of Appeals Opinion (On Remand), slip op. at 5. The court then quoted and reaffirmed its earlier conclusion that the fact that Sura and Keller had walked into Mr. Towne's backyard during the "knock and talk" did not lead to the discovery of the marijuana. *Id.* The court then similarly dismissed Henderson's actions during the "knock and talk" and concluding that he was just outside of the curtilage when he smelled the marijuana. *Id.* at 6-8. As for the fact that Henderson had walked across Mr. Towne's curtilage to get to his vantage point, the Court of Appeals found it irrelevant because it concluded that Henderson was not gathering information at that time. *Id.* at 8 n. 5.

The Court of Appeals' analysis was erroneous because *the observations by all of the officers that led to the seizure of the marijuana were indisputably the fruit of the unconstitutional*

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is in the third party's protected space; they need a search warrant (unless they have consent or an exigency). So *Hardin* and *Pruitt* simply have no application here.

[3] Amicus does not address Supplemental Question 4 from this Court's order granting MOAA, because the police *did* exceed the constitutional scope of a "knock and talk" in this case, as discussed in Argument I, both by arriving at 10:15 p.m. and by invading Mr. Towne's backyard.

"knock and talk" because that unconstitutional "knock and talk" created the exigency that ultimately "justified" the police entry into the home.[4]

The Supreme Court made this point crystal clear in *Kentucky v King*, 563 US 452; 131 S Ct 1849; 179 L Ed 2d 865 (2011). In *King*, exactly as in this case, the police approached the defendant's door and knocked. *Id.*, 563 US at 456. Exactly as in this case, the people inside the home reacted in a way that gave the police reason to believe evidence was being destroyed. *Id.* Exactly as in this case, the police entered and seized drugs. *Id.* at 456-57.

The Supreme Court in *King* held that the police entry there could be justified by exigency even though the police action "created" the exigency *so long as the police did not violate the Fourth Amendment while creating the exigency*. As the Court put it, "Where, as here, *the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment*, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed." *Id.* at 462 (emphasis added; footnote omitted).

This case, then, is the exact opposite of *King* in the one respect that matters. In *King*, the Court found that the officers' knocking on King's door "was entirely consistent with the Fourth Amendment." *Id.* at 471. The police here, as in *King*, created the exigent circumstance (destruction of evidence) by going to Mr. Towne's door but, unlike *King, that approach to the door in this case*

[4] In its Supplemental Question 4, this Court also asked whether the officers' entry upon smelling the marijuana could be justified under the "plain view" exception. The answer is definitively "no." The plain view exception allows officers to seize items for which they have probable cause that they are contraband or evidence *only if the officers are lawfully present where the items are found*. As the Supreme Court explained in *Coolidge v New Hampshire*, 403 US 443, 468; 91 S Ct 2022; 29 L Ed 2d 564 (1971), "*plain view alone is never enough to justify the warrantless seizure of evidence. . . .* Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. *But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure*." (Emphasis added).

violated the Fourth Amendment for the reasons discussed in Argument I.

To put it as plainly as possible: the police only smelled marijuana on December 15, 2011, because they had earlier unconstitutionally invaded Mr. Towne's curtilage, thus causing him to burn the marijuana. *King* stands for the proposition that it is acceptable for the police to create such an exigency if, and only if, they do so without violating the Fourth Amendment. The police failed that test here.

Therefore, the "exigency" that "justified" the police entry of Mr. Towne's home was the direct result of the Fourth Amendment violation the police had committed a few minutes earlier by engaging in an unconstitutional "knock and talk." The exclusionary rule therefore applies. *See Wong Sun v United States*, 371 US 471, 485; 83 S Ct 407; 9 L Ed 2d 441 (1963) ("The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.").

For these reasons CDAM requests this Court reverse the Court of Appeals or grant leave to appeal.

CONCLUSION

Therefore, amicus curiae Criminal Defense Attorneys of Michigan ask this Court to grant leave to appeal or to summarily reverse the decision of the Court of Appeals.

Respectfully Submitted,

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